STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSIE LEE MILLER,

Defendant-Appellant.

UNPUBLISHED
April 8, 1997

No. 176226
Saginaw Circuit Court
LC No. 93-008387-FC

Before: Markman, P.J., and O'Connell and D. J. Kelly*, JJ.

PER CURIAM.

At a jury trial in connection with the 1990 murder of Marvelle Toney, defendant Miller was convicted of second-degree murder, MCL 750.317; MSA 28.549, carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, and felony-firearm, MCL 750.227b; MSA 28.424(2). Miller was tried together with codefendants Michael Earl Young (No. 176222) and Martha Calbert (No. 176224). Miller was sentenced to concurrent prison terms of thirty to sixty years for second-degree murder and two to five years for carrying a dangerous weapon, both of which were to be served consecutive to the mandatory two-year sentence for felony-firearm. We affirm.

The evidence at trial established that, in the late evening of May 26, 1990, Marvelle Toney and Miller were involved in a dispute outside a nightclub (Soul Survivors Club) during which Miller chased Toney with a crowbar that she removed from the trunk of her car. After the altercation, Miller went to Calbert's house and said that she was going to kill the person who had fought with her. Calbert is Miller's sister. Once at Calbert's house, Miller went into a room and was seen loading and cocking a gun. Young, a nephew of Miller and Calbert, said that Miller should let him (Young) kill the guy and he placed a long gun in the trunk of Miller's car. The three defendants, along with Jennifer Clemmons, Barbara Barns and one other person, then drove to the Soul Survivors Club. En route, they discussed who would lure Toney out of the dub. When they arrived at the club, Calbert lured Toney into a position where Young could shoot him by telling Toney that she had car trouble. Young shot Toney twice and he died of a gunshot wound.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendants were not arrested for Toney's murder until 1993. On December 31, 1993, while awaiting trial in the instant case, Young was mistakenly released from prison. In a separate prosecution, it was charged that, after this release, he killed a clerk at a 7-Eleven store in Saginaw. Young was undergoing the preliminary examination for the charges arising from the 7-Eleven killing when this trial was about to begin and, as a result, there was considerable television and newspaper coverage of Young. One newspaper article stated that Young was awaiting trial in a 1990 slaying and stated that eight of his relatives were "behind bars," including four who were facing charges of murder.[1]

Miller first claims that the trial court abused its discretion in denying her motion for a separate trial. Specifically, she argues that she was prejudiced and denied her right to confrontation when several of Young's statements were presented to the jury and Young did not testify. In *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court held that "a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v Marsh*, 481 US 200, 201-202; 107 S Ct 1702; 95 L Ed 2d 176 (1987). The general rule is that a witness whose testimony is introduced at a joint trial is not to be considered a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant. *Richardson*, *supra* at 206. *Bruton* recognized an exception to this general rule when a codefendant's confession "expressly implicated" the defendant as his accomplice, creating a great risk that the jury will not follow instructions to disregard the codefendant's statement when assessing the guilt of the defendant. *Id*. at 207-208. The *Richardson* Court found *Bruton* inapplicable to the case before it because the codefendant's admission did not directly implicate the defendant, but rather implicated him only by inference in the context of other evidence introduced at trial. *Id*. at 208. The Court stated, at 208:

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential information, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule.

Here, Miller cites three statements that allegedly denied her the right of confrontation. The first was Young's statement to Lovie Barns that he shot someone near the "Hickory Rib" restaurant. There was no mention of Miller in this confession and, therefore, it could not have implicated her. The second example refers to the testimony of Tara Clay that Miller had gone to Calbert's that evening and that later in the evening Young returned and stated that he shot someone "because he got into it with his aunt."

Although this statement is a confession that Young shot the victim, it does not implicate Miller. Specifically, the statement does not indicate that Miller was with Young when he shot the victim, only that the victim at some point had been in a dispute with Young's aunt and that such dispute precipitated the shooting. Finally, Miller argues that Barns' testimony that Young asked her to lie to protect his aunts was grounds for a separate trial. This statement more directly implicated Miller's involvement in the charges at issue than the other two challenged statements. While this statement suggests that Young's aunts had done something that would require Barns to lie to protect them, it does not directly state that Miller was involved in the incident giving rise to the charges at issue. Thus, there does not exist the "overwhelming possibility" that the jury would be incapable of "obey[ing] the instruction that they disregard an incriminating inference" here. *Richardson*, at 208. Accordingly, it is not clear if this statement would fit within the *Bruton* rule for codefendant statements that expressly implicate a defendant as an accomplice. However, even if we assume that the court abused its discretion in allowing this statement into evidence, independent evidence justifying Miller's conviction was overwhelming and the admission of this statement was harmless beyond a reasonable doubt. See *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993) (a violation of *Bruton* is subject to "harmless error" analysis).

Miller next argues that the trial court erred when it refused to allow witness Barns to testify regarding her state of mind during the car ride from Calbert's house to the Soul Survivors Club. Miller argues that such testimony was admissible under MRE 803(3). However, she misapprehends this rule. MRE 803 lists exceptions to the hearsay rule, including an exception for "then existing state of mind." Under MRE 803(3), an extrajudicial statement may be admitted as a statement of state of mind if it refers to the state of mind of the *declarant*. *People v Brown*, 76 Mich App 733, 738; 257 NW2d 233 (1977). Here, there was no attempt to introduce an extrajudicial statement. Rather, there was an attempt to elicit testimony pertaining to the state of mind of the *witness* rather than some other declarant. Even if the trial court had been reviewing an out-of-court statement by witness Barns, such evidence would have been inadmissible because Barns' state of mind was not at issue here. See *People v DeWitt*, 173 Mich App 261, 268; 433 NW2d 325 (1988).

Miller next contends that the trial court abused its discretion when it dismissed a witness, Kervin Owens, who could have presented allegedly exculpatory evidence. The trial court stated that it dismissed the witness under MRE 601 because he was incapable of testifying understandably but appears also to have dismissed the witness because it found him incredible.[2] Although the court has a limited role to dismiss a witness who lacks a "sense of obligation to testify truthfully," MRE 601, generally the determination of the credibility of a witness is left for the trier of fact. *People v Harris*, 110 Mich App 636, 652; 313 NW2d 354 (1981). While we recognize that the witness in question was extremely combative and argumentative, upon review of the record, we believe that the court abused its discretion by striking his testimony. Owens testified that Toney had been involved in the initial fracas outside the club with Miller. This testimony was cumulative of other properly admitted evidence. However, Miller claims that Owens' earlier statement to the police, in which he stated that Toney was not involved in this initial fracas, was exculpatory. The net effect of Owens' contradictory statements -- his in-court testimony and statement to the police -- was confusing and ambiguous. Thus, it is unclear that Owens' testimony, including impeachment with his police statement, would have been

exculpatory regarding Miller. Moreover, Owens' testimony and police statement related to a peripheral issue -- the initial fracas that precipitated the homicide -- not the actual homicide at issue. Even if Toney had not been involved in the initial fracas with Miller, there was overwhelming evidence that Miller precipitated and participated in the subsequent murder of Toney. Accordingly, we find that any error was harmless beyond a reasonable doubt and would not justify reversal of Miller's conviction. See MCL 769.26; MSA 28.1096 and MCR 2.613(A).

Miller next argues that the trial court erred in scoring her ten points for Offense Variable 9 of the sentencing guidelines (i.e., leader in a multiple offender situation). The testimony demonstrated that, without Miller's instigation of this whole episode, Toney might still be alive. Miller's reaction to Toney's conduct initiated the chain of events leading to the homicide and she contributed materially to the actual shooting by driving Young and Calbert to the club and picking Young up after the shooting. There are sufficient facts to support the court's scoring decision. See *People v Reddish*, 181 Mich App 625, 628; 450 NW2d 16 (1989).

Finally, Miller argues that her sentence is disproportionate. Miller did not provide this Court with a copy of her presentence investigation report and has, therefore, waived the issue of the proportionality of her sentence. See *People v Rodriquez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). Nevertheless, considering her role as the instigator of this homicide offense, we are not persuaded that the trial court abused its discretion in sentencing her. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

For these reasons, we affirm Miller's judgment of sentence.

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly

[1] In addition to the three family members involved in the instant killing, a cousin of Young's was a codefendant in the 7-Eleven killing.

[2] MRE 601 states that a court may exclude a witness who "does not have sufficient physical or mental capacity or sense of obligation to testify truthfully," but requires that such a witness must be "question[ed]" as a precondition to exclusion.